KHAIRUL ANUAR ABU BAKAR

v.

LIM ENG CHOON

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL SUIT NO. 149 OF 1984]
23 SEPTEMBER 1990

TORT: *Plaintiff 12 years old during accident - Whether plaintiff's memory impaired to the extent contended - Whether plaintiff had taken reasonable care - Assessment of damages for brain injury.*

The plaintiff, K was 12 years old when this accident occurred; he was cycling home from school when a motorcycle knocked him on his right side. There was conflicting evidence as to whether K was riding in single file with his friend or abreast as alleged by defendant L. The sketch plan was not helpful as it merely showed where the investigating officer would have found the vehicles; there were no other marks on the sketch from which any conclusive inferences could be made supporting either K or L's version.

Held:

[1] On observation of K while he was giving evidence the Court found that he could remember a number of details as to the circumstances of the accident; however when it came to an important aspect of the case, that is whether someone else was cycling on the road, and whether he was riding abreast of another cyclist, he was equivocal. On the balance of probabilities, the Court accepted L's version; L's story coincided with the police report he made shortly after the accident.

[2] On the facts of this case and bearing in mind the principles enunciated in the judgment of Suffian J and the Court of Appeal in *Jag Singh v. Tong Fong Omnibus Co.*, in the instant case the plaintiff had not in his own interest taken reasonable care of himself.

[3] In relation to the brain injury suffered by K, bearing in mind the relevant authorities and the slightly less serious nature of the brain injury, the soft tissue injuries and the ensuring loss of amenities, including the matter of epilepsy as compared to the other authorities cited the Court awarded RM60,000 as damages for pain suffering and loss of amenities (on basis of full liability); for loss of earning capacity the multiplier was 24 years and the multiplicand RM150 p.m.

[Both parties equally liable.]

Cases referred to:

Jag Singh v. Tong Fong Omnibus Co. Ltd. [1962] MLJ 78
Marappan & Anor. v. Siti Rahmah [1990] 1 CLJ (Rep) 174
Kow Ah Dek & Anor. v. K.Ratnasingham [1981] 2 MLJ 24
Tham Yew Heng & Anor. v. Chong Toh Cheng [1985] CLJ (Rep) 878
Tominam bte Tukimin v. Toh Kai Chup [1985] 2 MLJ 345

For the plaintiff - Ramanathan; M/s. Brijandan Singh Bhar & Co.
For the defendant - Francis Nathar; M/s. Francis Nathar & Co.

JUDGMENT

KC Vohrah J:

This is an action for negligence brought against a motor cyclist by an infant suing by his father and next friend.

It is not disputed that on 17 October 1983 at about 1 p.m., the plaintiff on his bicycle and the defendant on his motor cycle were both proceeding on their proper side of the road in the direction of Jeniang on the Jeniang-Sik road.

The plaintiff was 12 years old then. He said he was cycling towards his home from school when a motor cycle knocked him on his right side. He said he could not remember what actually took place. Under cross-examination he asserted he was cycling close to the edge of the road. The inference is that the motor cyclist was negligent.

The motor cyclist, the defendant, said he saw two children in school uniform riding side by side on their bicycles pushing each other. As he tried to overtake them the plaintiff's bicycle which was on the outer side fell to its right after the plaintiff was pushed by his companion. The defendant's motor cycle grazed the handle of the bicycle.

A sketch plan was referred to at the trial. It showed the width of the left side of the road where the accident occurred as about 8½ feet. Otherwise it was not particularly helpful for it merely showed where the investigating officer (who died before the trial) must have found the bicycle and the motor cycle at the scene when he went there. There was no indication of broken glasses, tyre, scratch, or other marks in the sketch from which any conclusive inferences could be made supporting the version of the one or the other as to how the mishap took place.

On considering the evidence, however, I had doubts about the plaintiff's version of the accident. I found it inconsistent that the plaintiff could have remembered that he was riding close to the left edge of the road and that he was knocked on the right whereas he could not remember, at one stage, and it certainly was an important aspect of the case, whether he was riding abreast of another cyclist. The plaintiff at first said that there was no other school boy cycling in the same direction towards his house but when pressed he said there was no one in front and he said he did not know if there was anyone behind him. He denied riding abreast of another cyclist but when pressed, at stated earlier, he said he could not remember that though, a little later, he denied he and another person were pushing each other on the road whereupon the accident took place. I was mindful of the evidence of the neurosurgeon, PW5, that the plaintiff appeared forgetful as a result of the injuries sustained in the accident when he did some tests on him. PW5 admitted that the plaintiff could have pretended he was forgetful during the tests. I had opportunity to observe the plaintiff in Court as I had the benefit of his evidence. He certainly could remember a number of details as to what took place on the day of the accident; he said that it was a Monday (and it was), that it was 15 minutes after leaving school when the accident took place, that he was half way home when it took place, that he was close to the left edge of the road when the accident took place, that he was knocked on the right. Yet when it came to an important aspect of the case - as to whether someone else was cycling on the road - he was hesitant in his answers; he was equivocal, as he was when asked about whether he was riding abreast of another cyclist. My distinct impression of the plaintiff after taking into account his demeanour as well, was that he was not telling the truth.

My view is that the accident took place, on a balance of probabilities, as the defendant described it. He had seen the plaintiff and one other pupil riding side by side and the plaintiff's companion was riding closer to the left edge of the road and the plaintiff was within this boy's touching distance. The defendant was riding at about 50 to 60 k.p.h. along a slight bend at that time and he saw them some 100 feet away. The children were being playful and were pushing each other. He tried to overtake them by taking a path very near to the centre white broken line of the road. As he tried to do so the bicycle on the outer side fell to its right. He said it fell because the other cyclist pushed the plaintiff. The defendant said his motorcycle grazed the handle of this bicycle whereupon his motorcycle went out of control.

His story coincided with the story in the police report that he had made at 2.15 p.m. at the police station shortly after the accident. In the report he said that he saw two school children riding abreast and that the cyclist on the outer side suddenly fell t the right side of the road; he tried to avoid the cyclist but grazed the handle of the bicycle. The report did not state that the children were playing but I do not expect a terse report to contain such details bearing in mind that the essence of the report as regards the accident was that the bicycle on the outside suddenly fell and that defendant grazed the handle of this bicycle. There was a discrepancy between his evidence in Court where he stated that he first saw the two children cycling 100 feet away and his statement in his report which stated the distance was 100 yards. He said he had mentioned the distance as 100 feet for the report and it was not so taken down. Perhaps it was not taken down properly but the discrepancy is not material in any event.

The width of the left side of the road is about 8½ feet according to the sketch. The defendant estimated that the boy nearer the left edge was cycling about 5 to 6 feet from the left edge of the road and said that the two boys were within touching distance. His testimony that the two children were in the middle of the left side of the road being a recollection relating to special proportions in regard to the road is perhaps more accurate than his estimation that the plaintiff's companion was about 5 to 6 feet from left edge of road. Now it is not in evidence that just before the defendant decided to overtake the children they were pushing each other. It seems clear though that just shortly before he could overtake, and he was at that time close to the centre white broken line, he saw the plaintiff being pushed and his bicycle falling. It was at that stage of the bicycle falling that the motor cycle grazed the handle of the bicycle. It is a fair inference that had the bicycle not fallen the defendant would have had clear passage through and the accident would have been avoided. He had earlier seen that the cyclists in front of him were children and they were pushing each other, and he should have anticipated that they would resume playing as he was overtaking them and that one or both of them could lose balance and fall across his path; and he should have given a wider berth to them. On the other hand the plaintiff was 12 years old and he was in standard 6 and had been regularly cycling to school for the whole period of standard 6 up to October, though while in standard 5 he had occasionally cycled to school. Bearing in mind the principles enunciated in the judgment of Suffian J (as he then was) [*Jag Singh v. Toong Fong Omnibus Co. Ltd.*] [1963] MLJ 78 and also the judgment of the Court of Appeal in *Jag Singh v. Toong Fong Omnibus Co. Ltd.* [1962] MLJ at p. 271 respectively my view is that in the instant case the plaintiff had not in his own interest taken reasonable care of himself; he was aged 12 and in standard 6 and had sufficient discretion cycling to and from school for some time and he failed to appreciate a simple and basic rule of prudence that it was a rash and negligent thing to play on a road which was open to all sundry traffic while cycling. Thus in my view both parties were equally to blame for the accident.

Quantum

The plaintiff was admitted to hospital unconscious and he suffered several soft tissue injuries to the head and face in addition to diffused brain injury, damage to the right temporal lobe and the third cranial nerve. He was in hospital for 5 weeks in Sungai Petani and in Kuala Lumpur for about 3 weeks.

Because of the injuries to the brain and the third cranial nerve he appears to suffer from:

1. impaired sense of smell on left side;
2. slight left facial weakness;
3. weakness in left hand;
4. impairment of higher mental faculties;
5. third cranial nerve paresis;
6. post traumatic epilepsy.

I think there can be no dispute that the first two disabilities are present. As regards weakness of the left hand, and I accept he is left handed, the weakness is not serious - the report of the neurosurgeon states that the weakness is grade 4/5 and that fine and skilled movements like writing are affected.

As regards impairment of higher mental faculties, the consultant neurosurgeon, PW5, said that the plaintiff had suffered a drop in academic performance and that his memory was impaired and that (according to what the father told him) he did not mix with friends. I can accept the doctor's conclusion as regards the drop of academic performance (meaning that he would not be able to complete his secondary education) and that he does not mix with friends but from observation in Court and which I have dealt with earlier I am not at all convinced that his memory has been impaired to such an extent that it constitutes a serious disability.

As for the third cranial nerve paresis the consultant ophthalmologist, PW4, said that the muscle of the right eye is paralysed and there is a dropping of the right upper eyelid and a fixed and dilated pupil in the right eye. According to PW4 the vision itself has not been affected - the optic nerve is intact - but the plaintiff has a squint; and he is not able to converge both eyes on a near object and the would make him unable to do close work and reading unless he adjusts to using one eye.

In regard to post - traumatic epilepsy the evidence of the neurosurgeon PW5, was that medication would be able to control it and that if well controlled by medication it would not interfere with his daily life though certain conditions like stress and lack of sleep might precipitate epileptic attacks. It would not be safe for him to drive. If he goes up heights and develops a fit and falls down he would injure himself. But PW5 said the plaintiff could live by himself and he need not have a companion to look after him unless he has a fit. The neurosurgeon stressed that the plaintiff had to take medication and that if he stops his medication there is a high chance of epilepsy recurring.

In respect of the brain injury and the ensuing loss of amenities the case of *Marappan & Anor. v. Siti Rahmah* [1990] 1 CLJ (Rep) 174 was cited as justification for a request of RM120,000 as damages for the brain injury suffered by the plaintiff. In that case the accident victim suffered severe head injuries with concussion of the brain and fracture of the right front-parietal bone of the skull resulting in complete paralysis in all 4 limbs and general damages for pain and suffering and loss of amenities were given at RM180,000

on the basis of full liability (she was held 65% liable). But with respect I do not see in our present case the gravity of the brain damages and loss of amenities anywhere approaching the gravity of those in the *Marappan* case.

On the other hand in the case of *Kow Ah Dek & Anor. v. K.Ratnasingham* [1981] 2 MLJ 24 the Dek respondent had various soft tissue injuries, fracture of the nose and swelling of the brain. According to the neurosurgeon the respondent suffered 'minimal brain damage resulting in a considerable change in his behaviour'; he became talkative and full of complaints over small matters; he had lost self confidence and relied greatly upon his sister for material support; he had frequent headaches on the right side and also suffered decreased vision on his right eye; he was unable to apply himself to tasks requiring mental concentration and he had poor memory; he suffered from severe episodes of vertigo and he had fits and dizziness and he wore a collar round his neck. He was awarded RM70,000 as damages for pain, suffering and loss of amenities and the Federal Court while holding that the award was on the higher side confirmed the award as it was not shown that the Judge who gave the award had wrongly used his discretion in arriving at the figure. In our case the brain injury and the ensuing loss of amenities are less serious than those mentioned in *Kow Ah Dek*.

I think that of more relevance are two Singapore cases. In a 1984 Singapore case *Tham Yew Heng & Anor. v. Chong Toh Cheng* [1985] CLJ (Rep) 878 Thean J awarded S$35,000 for permanent brain damage to a boy aged 9 at the time of the accident and S$3,500 for the fractured maxilla and laceration of the right cheek suffered by the boy. Loss in amenities for the boy were defects in memory and in mental arithmetic.

In another Singapore case *Tominam bte Tukimin v. Toh Kai Chup* [1985] 2 MLJ 345 Chua J found the plaintiff wholly liable for the accident that she suffered but for completeness Chua J dealt with the question of quantum which was assessed at S$45,000 damages for pain and suffering for brain injury and loss of amenities; the plaintiff, an adult, sustained severe brain injury necessitating emergency surgery to remove blood clots. She also had repair done for a skull defect. She complained giddiness; walked unaided but with some difficulty and she had fairly marked difficulty in memory.

Chua J held S$12,000 to be a proper award for epilepsy in addition to the S$45,000 for the brain injury and loss of amenities. The epilepsy suffered by Tominam was considered to be major. In our case the epilepsy is not as serious and it is under control and can be controlled with medication.

Bearing in mind the parameters of the last three cases cited and the slightly less serious nature of the brain injury, the soft tissue injuries and the ensuing loss of amenities including the matter of the epilepsy as compared to those in the last two cases cited I awarded RM60,000 as damages for pain, suffering and loss of amenities. This award is on the basis of full liability.

There was a request for an award for medication for the epilepsy but the evidence shows he received treatment at a General Hospital and that supplies are obtainable from any General Hospital for free. I therefore did not award any sum.

As for the request for an award for nursing care for his epilepsy the evidence is that he does not require any nursing care and I did not award any sum.

For loss of earning capacity the multiplier was agreed at 24 years. What remained was how much the multiplicand should be. Counsel for the plaintiff requested for RM200 per month but I agreed with the defence Counsel that RM150 per month is more appropriate

bearing in mind that with his disabilities his chances of getting a job as a shop assistant earning RM300 to RM350 per month are better than his getting a clerical or other job earning about RM400 to RM500 per month. I therefore awarded RM43,200 on the basis of full liability.

The above general damages were awarded at 6% interest from date of service of writ to judgment and 8% thereafter.

Special damages was agreed at RM450 with interest at 4% from date of accident.

I ordered each party to bear its own costs.

Also found at [1990] 2 CLJ 994